



**BRIEFING: FEBRUARY 10, 2015 BOARD MEETING AGENDA ITEM #6**

**TO: Chairman Richard and Board Members**

**FROM: Thomas Fellenz, Chief Counsel**

**DATE: February 10, 2015**

**RE: Adoption of the Authority's Conflict of Interest Code**

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**Background**

Under the Political Reform Act (Act), all public agencies are required to adopt a conflict-of-interest code. That code designates employee or consultant positions that require Statements of Economic Interests (Form 700) filings. It also assigns disclosure categories specifying the types of interests to be reported. The Form 700 is a public document intended to alert public officials and members of the public to the types of financial interests that may create conflicts of interests.

The California High-Speed Rail Authority (Authority) has been engaged in a process with the Fair Political Practices Commission (FPPC) to amend its existing Conflict of Interest Code (Code) to update and expand the list of Authority State staff and consultants who are required to file Form 700's. This update is necessary because of the number of employee positions added at the Authority both on the private and public sector side. Persons who are required to file Form 700s hold positions that require that individual to make or participate in a government decision for the Authority.

The Authority's Board of Directors are included in the list of positions because the Board Members are required to file Form 700s pursuant to Government Code Section 87200 which is the most comprehensive type of conflict of interest reporting under the Act and is more stringent than the reporting requirement for the Authority staff and consultants covered under this conflict of interest code.

The Authority's Code must contain the following three components:

**1. Terms of the code**

The terms of the code comprise the main body of a code and include such provisions as the manner to report financial interests, the disqualification procedures, etc. The FPPC recommends that agencies incorporate FPPC Regulation 18730 by reference because the type of information required to be in the main body of the code is quite complex and Regulation 18730 contains all of these provisions. The FPPC will amend the regulation to include legislative and regulatory

changes that affect the main body of the code; therefore, this component of an agency's code is automatically in compliance with the Act.

## **2. Designated positions**

The code must specifically list positions that make or participate in making decisions that may foreseeably have a material effect on any financial interest, as set forth in subdivision (a) of Section 87302 of the Government Code. Typically, positions that involve voting on matters, negotiating contracts, or making recommendations on purchases without substantive review must be included in codes.

Again the Authority's Board of Directors are not to be included in the position list because they file Form 700s under the more stringent reporting requirement found in Government Code Section 87200.

For the Authority, some of the designated positions are filled by consultants. The Authority, in conjunction with staff at the FPPC, reviewed the organizational charts and duties of key personnel of major contracts including, but not limited to, the Program Management Team, Regional Consultant contracts and Project and Construction Manager contracts for inclusion within the Code. As per FPPC guidelines, the following criteria are used in assessing whether a position should be designated:

*A person "makes a governmental decision" when the individual, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) Therefore, such positions should be designated in the agency's conflict-of-interest code.*

*A person "participates in a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the individual negotiates, advises, or makes recommendations to the decision-maker regarding the governmental decision. (Regulation 18702.2.) If a superior relies on an individual's professional judgment, then the individual is participating in making a governmental decision. In other words, if the individual influences the final decision by supporting a position or suggesting a course of action, he/she is participating in the decision even if he/she is not making the final decision. Therefore, the individual's position must be designated in the conflict-of-interest code.*

Designated positions can be updated and are reviewed annually without requiring completion of the amendment process to be in effect. The Authority has required key staff and personnel that meet the requirements of a designated position to file Form 700s as the agency has grown.

Designated positions are also required to complete the state's Ethics Training and submit documentation to the Authority's Form 700 Filing Officer verifying compliance. The certification is required to be renewed every two years.

### **3. Disclosure Categories**

A primary purpose of the code is to require disclosure of those types of investments, interests in real property, sources of income and business positions that designated positions may affect in their decision-making. For example, the manager of an agency should be assigned full disclosure (all investments, interests in real property, sources of income and business positions) because the manager makes decisions that affect a wide range of interests. Alternatively, a purchasing agent whose decision-making is limited to the purchase of office supplies should only be assigned disclosure of investments, sources of income and business positions in entities that provide office supplies, equipment or merchandise of the type used by the agency.

The disclosure requirements for the Authority were developed with the cooperation of the FPPC through discussions, edits, reviews and comments.

### **Notice of Intention to Revise and Comment Period**

The Authority provided notice beginning Friday, November 21, 2014 that pursuant to the authority vested in it by Section 87306 of the Government Code it proposed amending its Code. Notice and a copy of the proposed Code was provided via email to all staff, posted on the Authority's website and in the California Regulatory Notice Register published by the Office of Administrative Law.

The purpose of these amendments was to implement the requirements of Sections 87300 through 87302, and Section 87306 of the Government Code. Interested parties were invited to submit comments to the listed contact person available through email, by phone or by mail.

The comment period ended on Monday, January 5, 2015. As stated in the published notice, any interested person or the person's representative could have submitted a request for a public hearing by Monday, December 22, 2014. No requests were submitted for a hearing.

As part of the process, the Authority was required to, and did make the following findings that the proposed amendments:

1. Impose no mandate on local agencies or school districts.
2. Impose no costs or savings on any state agency.
3. Impose no costs on any local agency or school district that are required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.
4. Will not result in any nondiscretionary costs or savings to local agencies.
5. Will not result in any costs or savings in federal funding to the state.
6. Will not have any potential cost impact on private persons, businesses or small businesses.

Additionally, the Authority determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the amendments are proposed or would be as effective as and less burdensome to affected persons than the proposed amendments.

## **Discussion**

The Authority received 12 comments from seven individuals via email. Authority staff acknowledged the responses and where requested provided additional information. The full text of the comments received is attached for your reference.

In response to Comment 1 regarding the distance from a proposed station site, Authority staff spent several weeks working with FPPC staff to determine a reasonable distance that could be quantified on the yearly reporting schedule. It is understood that as decisions regarding stations or alignments are made, any member of the public could make an investment decision based on publicly available information. The intent of the disclosure categories is to address individuals with a financial interest at the time of the decision. The distance chosen is farther than usually required by local municipalities (i.e. most cities require disclosure of a financial interest within 500 feet of a location requiring action before the city council) while recognizing that proposed station locations are publicized years in advance of construction; include input and planning efforts from local jurisdictions; involve input and in some cases concurrence from state and federal partners; and are subject to environmental review.

In response to Comment 2, the responsibilities of new employees are reviewed as part of the new employee orientation. If the position qualifies as one subject to the Code based on the criteria discussed above, that employee is required to file a Form 700 even if the position is new and was not previously listed on the Code.

Comments 3 and 4 requested the approved Code and will be sent the final version once fully adopted. Comments 5 and 12 were requests for copies of the proposed Code and copies were provided to them.

Comments 6, 7, 8, 9, 10 and 11 pertained to the applicability of the Code to the Authority's Board. With the passage of AB 41 (2012), the Authority's Board Members were added to the list of filers under Section 87200 of the Government Code. As noted at the time of bill passage, this bill added the Board Members to a statutorily-designated list of high-ranking public officials who are subject to the most expansive disclosure requirements under the Act. Section 87200 filers submit their Statements of Economic Interest directly to the FPPC and are required to follow additional rules regarding disclosure of a conflict of interest or potential conflict of interest.

As the Board is not subject to the Authority's Code, Board Members cannot amend nor limit their own disclosure requirements through any amendments to the Code.

## **Next Steps**

There are two steps remaining in the process. The Board is required to adopt the Code for the agency and then the Code will be submitted to the FPPC, the Authority's code reviewing body (Section 87303) for final approval.

### **Recommendation**

Staff recommends the Board approved and adopt the attached Conflict of Interest Code for the Authority.

### **Attachments**

- California High-Speed Rail Authority Conflict of Interest Code, as proposed to be adopted
- Comments Received During the Comment Period
- Resolution #HSR15-06 Adoption of the Authority's Code